

2019 Legislation Affecting Bankruptcy Practice

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Appendix E

**Side-by-Side Comparison of a SBRA Small Business Debtor Reorganization
under Subchapter V of Chapter 11 with a Small Business Plan Confirmation
under Section 1129 and Related Provisions**

*This chart is a work in progress and will be updated and replaced with updated versions on the website of the
NACTT Academy, <http://considerchapter13.org>, as appropriate.*

Small Business Chapter 11 Plans (<i>without</i> Subchapter V Election)	Small Business Reorganization (<i>after</i> Subchapter V Election)	
	§ 1191(a) - Consensual	§ 1191(b) - Non-Consensual
BASIC REQUIREMENTS (The Court or any individual dissenting creditor may challenge if all requirements are not met:)		
§ 1129(a)(1): Plan complies with applicable provisions of Chapter 11 (e.g., proper classification)	§ 1191(a) & (b): § 1129(a)(1)-(6) apply to a SBRA plan.	
§ 1129(a)(2): Proponent complies with applicable provisions of Chapter 11 (e.g., no improper solicitation)		
§ 1129(a)(3): Plan proposed in good faith and not by means forbidden by law		
§ 1129(a)(4): Payments for services, etc., are disclosed and reasonable or to be fixed by court after confirmation		
§ 1129(a)(5): Disclosure of post-confirmation directors, officers, voting trustees and insiders		
§ 1129(a)(6): Regulatory approval (if any)		

<p>§ 1129(a)(9): Priority claims to be paid properly</p>	<p>§ 1191(a) & (b): § 1129(a)(9) applies to a SBRA plan.</p>	<p>§ 1191(e) Special rule.--Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.</p>
<p>§ 1129(a)(10): At least one impaired class accepted plan without vote of insider(s)</p>	<p>§ 1191(a): § 1129(a)(10) applies to a SBRA plan.</p>	<p>§ 1191(b): Plan may be confirmed without compliance with § 1129(a)(10) if it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, plan.</p>
<p>§ 1129(a)(11): Plan is feasible (not likely to be followed by liquidation, reorganization, etc., unless proposed by plan)</p>	<p>§ 1191(a) & (b): § 1129(a)(11)-(14) apply to a SBRA plan.</p>	
<p>§ 1129(a)(12): All fees payable under 28 U.S.C. § 1930 must be paid or provided for in plan on effective date of plan</p>		
<p>§ 1129(a)(13): Plan provides for all retiree benefits to be paid for duration of period debtor is obligated to pay such benefits.</p>		
<p>§ 1129(a)(14): Debtor has paid all DSOs payable under order or statute that first become payable after the date of filing of petition.</p>		
<p>§ 1129(a)(15): Individual debtor must pay objecting unsecured creditor (A) present value NLT amount of claim; or (B) NLT projected disposable income [per § 1325(b)(2), below] for 5 years from payment due date under plan, or for plan payment term, whichever is longer.</p>	<p>§ 1181(a): § 1129(a)(15) does not apply to a SBRA plan.</p>	<p>§ 1191(b): Plan may be confirmed without compliance with § 1129(a)(15) if it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, plan.</p>
<p>§ 1129(a)(16): Transfers of property under plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.</p>	<p>§ 1191(a) & (b): § 1129(a)(16) applies to a SBRA plan.</p>	

<p>§ 1129(c): Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.</p>	<p>§ 1181(a): § 1129(c) does not apply to a SBRA plan.</p>	
<p>§ 1129(d): Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.</p>	<p>§ 1129(d) is not made inapplicable to a SBRA plan.</p>	
<p>ADDITIONAL REQUIREMENTS:</p>		
<p>§ 1129(a)(7)(A)(ii): Each dissenting creditor must receive not less than <i>liquidation</i> value of claim ("best interests").</p>	<p>§ 1191(a) & (b): § 1129(a)(7) applies to a SBRA plan.</p>	
<p>Each class also must:</p>		
<p>§ 1129(a)(8)(A): accept as class, or § 1129(a)(8)(B): not be impaired, or § 1129(b)(1) ("Cram Down"): plan "does not discriminate unfairly against" class, and "is fair and equitable with respect to" class</p>	<p>§ 1191(a): § 1129(a)(8) applies to a SBRA plan.</p>	<p>§ 1191(b): Plan may be confirmed without compliance with § 1129(a)(8) if it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, plan.</p>
	<p>§ 1181(a): § 1129(b) does not apply to a SBRA plan.</p>	

<p>Meaning Of "Cram Down" as to Rejecting Secured Class: §1129(b)(2)(A)(i) (subject to 1111(b)(2) election): retain lien and receive payments with present value equal to <i>ongoing</i> value of collateral and with future amount of payment dollars equal to "allowed amount of claim" <i>or</i> §1129(b)(2)(A)(ii): collateral sold <i>and</i> lien attached to proceeds <i>or</i> §1129(b)(2)(A)(iii): "indubitable equivalent" of claim</p>	<p>§ 1181(a): § 1129(b) does not apply to a SBRA plan.</p>	<p>§ 1191(c) Rule of construction.--For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements: (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title. ... (3)(A)(i) The debtor will be able to make all payments under the plan; or (ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and (B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.</p>
<p>Residential Mortgage Impairment Restrictions:</p>		
<p>§ 1123. Contents of plan. ... (b) ... [A] plan may— ... (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims</p>	<p>§ 1190. Contents of plan. A plan filed under this subchapter-- (3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was-- (A) not used primarily to acquire the real property; and (B) used primarily in connection with the small business of the debtor.</p>	

<p>Meaning Of "Cram Down" as to Rejecting Unsecured Class: §1129(b)(2)(B)(i): Each claimant in class receive or retain value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) no claim or interest junior to class will receive or retain any property, except individual debtor "may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."</p>	<p>§ 1181(a): § 1129(b) does not apply to a SBRA plan.</p>	<p>§ 1191(c) Rule of construction.--For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements: ... (2) As of the effective date of the plan-- (A) the plan provides that all of the projected disposable income [defined by § 1191(d), below] of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor [defined by § 1191(d), below].</p>
<p>Meaning Of "Cram Down" as to Rejecting Class of Interests: §1129(b)(2)(B)(ii) – junior claim or interest holders will not receive or retain any property, except individual debtor "may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."</p>		<p>(3)(A)(i) The debtor will be able to make all payments under the plan; or (ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and (B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.</p>

PLAN FILING/CONFIRMATION PROCEDURES:	
<p>§ 1121(e): (1) 180 day exclusivity period; for extension, debtor must show by preponderance that more likely than not plan will be confirmed in reasonable time; (3) order to be entered setting new deadline prior to expiration of 180 day period</p>	<p>§ 1181(a): §§ 1121 does not apply to a SBRA plan. Only debtor may file plan</p>
<p>§ 1121(e)(2): 300-day maximum for filing plan by any party; same requirements for extension</p>	<p>§ 1189(b): 90-day deadline for filing plan; extension allowed if need attributable to circumstances for which "debtor should not justly be held accountable"</p>
<p>§ 1129(e): Court to confirm plan not later than 45 days from its filing; same requirements for extension</p>	<p>§ 1181(a): § 1129(e) does not apply to a SBRA plan</p>
DEFINITIONS OF DISPOSABLE INCOME:	
<p>§ 1325(b)(2): ... current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended-- (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.</p>	<p>§ 1191(d): ... income that is received by the debtor and that is not reasonably necessary to be expended-- (1) for-- (A) the maintenance or support of the debtor or a dependent of the debtor; or (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.</p>

	PRIMARY STATUTORY AUTHORITIES:	
	<p>Text of § 1181: § 1181. Inapplicability of other sections (a) In general.--Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter. (b) Court authority.--Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter. (c) Special rule for discharge.--If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.</p>	
	<p>Text of § 1191(a): The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.</p>	<p>Text of § 1191(b): Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.</p>

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